

Appeal of Newberry Pet Centers

The issue presented is whether respondent properly applied appellant's overpayment of tax to an existing liability.

On December 3, 1979, appellant filed its franchise tax returns for income years ended September 30, 1977, September 30, 1978, and September 30, 1979. During those income years, appellant was not doing any business and had no income. Thus, each of the returns showed a tax liability for the minimum tax of \$200. The returns for income years 1977 and 1978 each reflected a credit from an overpayment in a prior year in excess of \$200. Respondent's treatment of these overpayments led to this appeal.

Respondent applied the 1977 overpayment, which was approximately \$250, to a penalty of \$250 assessed by respondent against appellant for failure to file an annual corporate organization statement. Appellant's position apparently is that this penalty was not properly imposed.

Section 1502 of the Corporations Code requires every corporation to file an annual statement containing certain information. Section 2204 of **the Corporations Code** provides that after fulfilling certain notice requirements, the Secretary of State shall certify to the Franchise Tax **Board** the name of any corporation which fails to file the required statement. Upon certification, the Franchise Tax Board is required to assess a penalty of \$250 against the corporation. (Corp. Code, § 2204, subd. (b); Rev. & Tax. Code, § 25936.) This penalty can be abated only if the Secretary of State decertifies the name of the corporation to the Franchise Tax Board. (Corp. Code, § 2204, subd. (e); Rev. & Tax. Code, § 25936.) In the present case, the Secretary of State certified appellant's name and did not decertify it. Therefore,, respondent properly assessed the subject penalty.

The application of appellant's overpayment to satisfy the penalty was also correct. The penalty **for** failure to file a corporate organization statement is **to** be collected as other taxes, interest, and penalties. (Rev. & Tax. Code, § 25936.) If a taxpayer overpays any tax liability, respondent is specifically authorized to first credit the overpayment against any amount then due from the taxpayer, and refund only the balance. (Rev. & Tax. Code, § 26071.) Since this is precisely the action taken by respondent, we must conclude that it was proper.

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The dispute over the 1978 overpayment is apparently the result of a misunderstanding. Appellant's return for income year 1978 reflected an overpayment of approximately \$525. On the return, appellant failed to specify whether it wanted the overpayment refunded or credited against its tax liability for income year 1979. However, appellant's 1979 return, which was filed on the same date as the return for 1978, claimed a credit for the 1978 overpayment. Respondent allowed this credit; therefore, it correctly refused to refund the 1978 overpayment.

For the above reasons, respondent's action must be sustained.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claims of Newberry Pet Centers for refund of franchise tax in the amounts of \$240.20 and \$524.35 for the income years ended September 30, 1977, and September 30, 1978, respectively, be and the same is hereby
s u s t a i n e d .

Done at Sacramento, California, this 5th day of April , 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Bennett and Mr. Harvey present.

<u>Richard Nevins</u>	, Chairman
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>William M. Bennett</u>	, Member
<u>Walter Harvey*.</u>	, Member
<u></u>	, Member

*For Kenneth Cory, per Government Code section 7.9